82-915

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE R. DONNELL, HERBERT BOLER, THOMAS F. AKERS, PAUL A. PRIDE, JAMES R. ANDREWS, Members of the Board of Supervisors of the County of Warren, Mississippi, Acting for and on behalf of the County of Warren,

Petitioners

v.

UNITED STATES OF AMERICA

and

EDDIE THOMAS, SR., CHARLIE STEELE, FRANK H. SUMMERS, ST. CLAIR MITCHELL, MRS. CHARLIE HUNT, TOMMIE LEE WILLIAMS, SR., WILLIE JORDAN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When intervention occurs, what is the proper test to be employed for determining "prevailing party" status when the intervenor subsequently seeks a fee award?

2. Did the court below correctly define the "special circumstances" exception to an award of fees in proceedings brought pursuant to section 5 of the Voting Rights Act when the applications for fees demonstrated (a) massive duplication between counsel representing intervenors; and (b) no division of effort by those applying for fees and four attorneys representing the Department of Justice?

3. Did the court below commit error in determining that in all cases brought in the District of Columbia the hourly rate to which counsel for prevailing parties will be entitled is the hourly average for attorneys practicing in the District?

4. Did the court below commit error in concluding that it was proper to base an award of fees on the average hourly rate of members of the private bar when a prevailing party is represented by an attorney employed by a not-for-profit organization?

5. Did the court below err in not properly defining the scope of procedural responsibilities of a district court judge when an application for attorneys' fees is contested?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 25, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 682 F.2d 240 and appears at Appendix A. The opinions of the District Court for the District of Columbia are unreported and appear at Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1982. Petitions for Rehearing and Rehearing en banc were denied on July 22, 1982. On October 1, 1982, the Chief Justice entered an order extending the time for filing the petition to and including December 4, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, section 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On March 6, 1978, petitioners, members of the Board of Supervisors of Warren County, Mississippi, invoked the jurisdiction of a three-judge court in the District of Columbia seeking a declaratory judgment pursuant to section 5 of the Voting Rights Act.[1] The county was represented by its attorney, a professor from the University of Mississippi Law Center and counsel in the District of Columbia retained to comply with the district court's local rule. Each was to be compensated at a rate of fifty dollars per hour. The United States, as named defendant, was represented by four attorneys from the Voting Rights Section of the Department of Justice. Respondents-intervenors (minority voters of the county) were represented by Mr. Frank Parker, a Jackson, Mississippi, attorney practicing in the Jackson office of the Law-

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[1] 42 U.S.C. § 1973c (1976). The purpose of the suit was a declaration that a proposed redistricting plan did not have the purpose or the effect of denying or abridging the right to vote on account of race.

yers' Committee For Civil Rights Under Law, Mr. James Winfield, a private practitioner of Vicksburg, Mississippi, and, for purposes of complying with the district court's rule, Mr. Richard Kohn, an attorney in the Washington office of the Lawyers' Committee.

Proceedings in the case may be divided into four segments: a discovery period of approximately one year and a half; preparation of pretrial briefs and drafting proposed findings of fact and conclusions of law; a one-hour appearance in the district court for oral argument before the three-judge panel; and finally, after the district court's denial of declaratory relief, preparation of a Jurisdictional Statement and Motions to Affirm.

After this Court's refusal to review the judgment of the three-judge court, 444 U.S. 1059 (1980), respondents filed for an award of fees in excess of $89,000. Mr. Parker requested $100 per hour for 381 hours and Mr. Kohn claimed 47 hours of work on the case at the same rate. Respondents submitted affidavits in support attesting that this rate fairly reflected the average charged by attorneys practicing with major firms in the District. Mr. Winfield requested $75 per hour for 182 hours he claimed to have expended on the case. In support of his claim he filed an affidavit stating that "for a case of this magnitude and significance, my [Mr. Winfield's] hourly rate is $75 per hour." Ms. Barbara Phillips, a staff attorney in the Jackson, Mississippi office of the Lawyers' Committee, requested $75 per hour for 30 hours expended by her in preparing the motion and affidavit in support of an award of fees. This rate was presumably intended to reflect the average rate for attorneys in the District with her experience. Respondents also contended that the total allegedly due should be increased by a multiplier of 1.5 to reward each attorney for the quality of representation supplied throughout the case.

When attempts to negotiate a settlement failed, petitioners requested an evidentiary hearing. In addition to

arguing that the average hourly rate charged by similarly-situated members of the Mississippi bar ($50 per hour) was the correct figure to be employed if an award were deemed proper, petitioners' memorandum in support of a hearing raised the following issues:

(1) Affidavits filed by Messrs. Parker, Kohn and Winfield were not sufficiently particularized inasmuch as none attempted to catalog the activities undertaken (attending depositions; drafting interrogatories, writing briefs, etc.) in a form which clearly demonstrated that the activity in question was necessary to protect their clients' interest and not merely duplicative of activities engaged in during the same time period by one or more of the four attorneys representing the Department of Justice.

(2) The affidavits were replete with duplicative entries. For instance, fifty-three of seventy-four entries by Messrs. Parker and Windfield were for identical work, *e.g.*, reviewing the same motion, attending the same deposition, reading the same brief, noticing the same deposition. Moreover, although Mr. Winfield and Mr. Parker were in separate offices (forty miles apart), thirty-six of the duplicative entries attested to an *identical* number of hours for performing the *same* function.[2]

(3) Mr. Winfield's affidavit listed his presence at over ten depositions which petitioners contended he did not attend. In response, petitioners filed not only cover sheets from the depositions in question to show that in each case the court reporter had not noted his presence but also affidavits of some deponents (including the local president of the NAACP) to the effect that Mr. Winfield had not been present.

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[2] See Appendix C, pp. 34a-39a, for a chart listing the billings of these two attorneys. Entries which are italicized are those which are identical as to time.

Without holding the requested hearing, District Judge June Green awarded over $73,000 in fees. To reach this figure, she determined that the average hourly rate should be that prevailing in Mississippi. In the court's view, this translated into $85 per hour for Messrs. Parker and Kohn and $60 per hour for Ms. Phillips and Mr. Winfield. The court then multiplied the base figure for the fee award by the requested enhancement factor of 1.5.[3] Because the case was "complicated" the duplication of hours did "not concern the Court," *albeit* 9.2 hours were reduced from Mr. Winfield's time to reflect nonappearance at two of the more than ten depositions which petitioners alleged he failed to attend.

In reversing, the Court of Appeals wrote a wide-ranging opinion which (1) set standards for determining when an intervenor in a section 5 case may lay claim to "prevailing party" status; (2) determined that in the instant case and in all future section 5 cases the "average hourly rate" for those attorneys representing intervenors is that prevailing in the District of Columbia; (3) concluded that although serious questions were raised whether intervenors' "participation needed to be so extensive given the central role played by four attorneys from the Department of Justice," an evidentiary hearing should be limited to Mr. Winfield's application, *i.e.*, although duplication had been alleged, no "reasonable basis [exists] for believing [that Mr. Parker's or Mr. Kohn's] filing is excessive;" and (4) concluded that the district court utilized inappropriate criteria to determine that a 1.5 multiplier was warranted.

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[3] The final total was reached by an analysis contained in a Memorandum Opinion which was amended by a subsequent order of the Court. See Appendix B.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

When Congress amended the Voting Rights Act to provide for an award of fees to a "prevailing party" in actions brought to enforce "voting guarantees of the fourteenth and fifteenth amendment," [4] it incorporated therein legislative purposes underlying a significant portion of modern day fee-shifting statutes, including those currently employed when construing 42 U.S.C. § 1988 (1976).[5] One of these is the congressional determination that pursuant to this Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), successful parties "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." [6]

The issues raised by this case are only some of those which continue to plague the lower courts in their ongoing attempts to develop a realistic, workable method of effectuating this legislative purpose without subjugating the equitable interests of the parties to whom the fee is shifted. When may a litigant lay claim to "prevailing party" status? What is a "reasonable fee" and how should it be computed? What is the scope of the "special circumstances" exception, and, finally, what procedures are required of the district court when a fee request is contested? Thus, although this case arises in the specific context of section 5 of the Voting Rights Act, it also provides an appropriate vehicle for establishing definitive guidelines applicable not only to 42 U.S.C. § 1988 but also to many of the more than 120 separate pieces of legislation incorporating the fee-shifting approach.[7] *Cf. Hensley v. Eckerhart*, No. 81-1244.

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[4] 42 U.S.C. § 1973*l*(e).

[5] See, *e.g.*, Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980).

[6] S. REP. No. 295, 94th Cong., 1st Sess. 40 (1975).

[7] See E. R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 323 (1981).

II. THERE IS A CONFLICT BETWEEN THE CIRCUITS AND WITHIN THE DISTRICT OF COLUMBIA CIRCUIT ITSELF ON STANDARDS TO BE APPLIED FOR THE PURPOSE OF DETERMINING PREVAILING PARTY STATUS VIS-A-VIS INTERVENORS

The present conflict in circuits with respect to the correct test to be applied for purposes of defining a prevailing party is well known. *Kenley v. Young*, 102 S.Ct. 1476 (1982) (Justices Rehnquist and O'Connor dissenting from denial of certiorari). See also *Johnston v. Jago*, No. 81-3433 (6th Cir., Oct. 22, 1982) (noting the continuing conflict on the issue). In cases involving intervention, where the intervenor subsequently lays claim to prevailing party status for purposes of a fee award, proper resolution of the issue is equally in dispute.

The Fifth Circuit, in *E.E.O.C. v. Strasburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272 (5th Cir. 1980), held that when "benefits resulting" to intervenors are "primarily brought about" by a government entity's participation in a suit, an award is improper. *Id.* at 1274. Subsequently, and without reference to *Strasburger*, the court held that although intervenors "played a role" in litigating the case, denial of fees was appropriate where the "sole success" in the case resulted from the efforts of another party. *Lipscomb v. Wise*, 643 F.2d 319, 322 (5th Cir. 1981).

A more liberal approach has been taken by the Ninth Circuit. In *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd on other grounds*, 102 S. Ct. 3187 (1982), it was argued that intervenors should not be awarded fees as prevailing parties because "they played a *de minimis* role in the trial on the merits." [8] The court rejected this analysis, holding it was sufficient that the intervenors had responsibility for an important

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[8] 633 F.2d at 1349.

but unlitigated issue. Because it perceived a congressional purpose in the enactment of 42 U.S.C. § 1988 of "encouraging constitutional litigation," the court held that

> to . . . deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties.[9]

Congress, of course, failed to incoporate section 5 proceedings within the literal language of 42 U.S.C. § 1973*l* (e) and the former hardly fits the definition of "proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." Moreover, the only suggestion that fees may be available to private intervenors in such proceedings is found in a minor footnote in the Senate Report.[10] Lacking guidance as to when, and under what circumstances those laying claim to the status of private attorneys general may claim fees for their efforts in cases where Congress has specifically mandated that the real Attorney General have sole responsibility to protect rights granted, the court below rejected the Ninth Circuit approach and established criteria somewhat less demanding than that found in the Fifth. At one end of the spectrum are those situations where intervenors contrib-

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[9] *Id.*

[10] In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiff and/or plaintiff intervenors. However, in the procedural posture of some cases (e.g. a declaratory judgment under Sec. 5 of the Voting Rights Act), the parties seeking to enforce such rights may be the defendant and/or defendant intervenors.

S. Rep. No. 295, 94th Cong., 1st Sess. 40 n.42 (1974).

There is a significant question as to whether such a minor reference in a legislative history is to be given controlling weight. Cf., Chrysler Corp. v. Brown, 411 U.S. 281, 311 (1979); SEC v. Sloan, 436 U.S. 103, 121 (1978).

ute "little or nothing of substance" [11] or do not add "in any essential way" [12] or whose arguments are "mostly redundant . . . or . . . otherwise unhelpful." [13] At the other are those whose participation results in a "unique contribution" [14] or who "contribute . . . substantially to the success of the litigation." [15]

After the lower court handed down its decision, another panel within the same circuit issued its opinion in *Commissioners Court of Medina County v. United States*, 683 F.2d 435 (D.C. Cir. 1982). Without reference to the instant case, it initially determined that "active participation" [16] by intervenors in section 5 proceedings was sufficient for these parties to lay claim to prevailing-party status. Turning to the "special circumstances" exception, it then proceeded to list considerations which may warrant a total denial of fees, including determinations of whether the "net result" was so far removed from the position of intervenors that "the victory can fairly be said to be a pyrrhic one;" [17] whether the result obtained was "only the position" taken by the United States; [18] whether participation by intervenors was "necessary to protect their interests or further . . . the public policy embodied in the Voting Rights Act;" [19] whether the inter-

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[11] Appendix A at 10a.

[12] *Id.* at 12a.

[13] *Id.* at 13a.

[14] *Id.* at 12a.

[15] *Id.* at 12a.

[16] 683 F.2d at 443. Although the case arose from a fee request where the case was settled prior to final judgment, the court stated that its reasoning was intended to be placed "on the same par" as cases decided on the merits. *Id.* at 442.

[17] *Id.* at 443.

[18] *Id.*

[19] *Id.*

venors had an "independent impact" on the outcome;[20] or whether they have affirmatively demonstrated that participation "was not a mere duplication of efforts expended by the United States."[21] The net result of *Medina County* is another set of unique standards, many of which conflict with those enunciated by the lower court in the instant case.

The lower court opinion is in conflict with decisions of the Fifth and Ninth Circuits as well as an opinion in its own circuit. Certiorari should be granted to determine under what circumstances intervenors are entitled to an award of fees as prevailing parties.

III. THERE IS A CONFLICT IN CIRCUITS AND WITHIN THE DISTRICT OF COLUMBIA CIRCUIT AS TO THE PROPER APPLICATION OF THE "SPECIAL CIRCUMSTANCES" EXCEPTION

In one portion of its opinion, the lower court responded to petitioners' arguments that hours claimed by counsel for intervenors were overwhelmingly duplicative, not only as between themselves, but also of efforts by the four attorneys from the Department of Justice, by noting that if the hours were "mostly redundant" an award of fees would be inappropriate.[22] In another section, however, it held that if intervention in the instant case was of such a caliber to warrant an award of fees, *e.g.*, if the trial court should determine that intervenors "contributed substantially," all hours requested by counsel should be compensable.[23]

In contrast, the *Medina County* panel admonished that for all hours to be compensable, the *record* must show

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[20] *Id.*

[21] *Id.*

[22] App. A at 13a.

[23] *Id.* at 14a.

that "participation . . . [is] not a mere duplication of the efforts expended by the United States." [24] This analysis coincides with that of the First Circuit which, after noting that the submitted records of fee applicants did "not indicate how responsibility for issues" was divided by participating counsel, admonished that a

> convincing description of the division of labor must accompany reports of contemporaneous or identical work performed by several attorneys if deductions for duplication are to be avoided.

Furtado v. Bishop, 635 F.2d 915, 922 (1st Cir. 1980).[25]

The First Circuit approach is, in turn, a rephrasing of the directive contained in the case which is conceded to be one of the major lower-court decisions in the country on standards to be used in awarding fees:

> The trial judge is necessarily called upon to question the time, expertise and professional work of a lawyer . . . . But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorney's fees just as he would bear the burden of proving a claim for any other money judgment.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974).

Attached as Appendix C is a chart listing entries by Messrs. Parker and Winfield in support of an award of fees. For purposes of evaluation, entries by each attorney for work done on identical days and for identical tasks and the time spent for each are placed side by side. In contrast to that required by the First Circuit and the *Medina County* decision, there is no description at all, much less a "convincing description," of any division

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[24] 683 F.2d at 443.

[25] See also King v. Greenblatt, 560 F.2d 1024, 1027 (1st Cir. 1977) (requiring "full and specific accounting").

of labor either between themselves or the four attorneys with the Department of Justice who were contemporaneously performing the same tasks, *e.g.*, attending depositions, filing motions and the like. By refusing to require that intervenors affirmatively demonstrate that "their participation . . . was not a mere duplication of the efforts expended by the United States," [26] and by not requiring a "convincing description" of such an arrangement in their submission, the lower court decision is in conflict with the First Circuit as well as another decision within the District of Columbia Circuit itself. The issue of duplication and its effect on a proper determination of the "special circumstances" exception warrants a grant of certiorari in the instant case.

IV. THERE IS A CONFLICT IN CIRCUITS AS TO A PROPER DETERMINATION OF THE "PREVAILING HOURLY RATE" WHEN A COURT DETERMINES THAT AN AWARD OF FEES IS PROPER

In *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. (1982), *pet'n for cert. pending*, No. 81-2135, the court held that when a requested fee is significantly higher than that prevailing in the community where the district court sits, the rate where "an attorney normally practices" [27] will be used unless services of "like quality" are available in the "locality where the cause is heard." [28] Subsequently, the Eighth Circuit reviewed a case from Arkansas in which an attorney requested an hourly rate reflective

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[26] The District of Columbia Circuit has also held that "hours not properly billed to one's client are also not properly billed to one's adversary." Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980)(en banc). The issue which has been raised throughout, of course, is whether counsel for intervenors were representing a private fee-paying client, a decision to bill for work also accomplished by the Department of Justice would have been proper.

[27] 670 F.2d at 769.

[28] *Id.* at 768.

of that prevailing in California, where he normally practiced. Agreeing that "out-of-town counsel [are not] always . . . limited to *lower rates* [where the case is tried]," [29] the court nevertheless concluded:

> our knowledge of the bar leaves us no doubt that plaintiff could have found adequate counsel closer to the situs of the case for substantially less than $170 an hour.[30]

These decisions reflect an equitable approach to an award of attorneys fees: the party to whom a fee is shifted should not be liable for fees *higher* than that charged in the community where the case is tried unless it is clear that it was necessary for the prevailing party to go outside that community in order to secure specialized legal talent necessary to win the case.

The approach taken by the lower court is diametrically opposed to that of the Seventh and Eighth Circuits. Although the Court recognized the *Chrapliwy* precedent (and presumably its equitable approach to awards),[31] it proceeded to hold that the "prevailing market rate" of the District of Columbia would be applied in the instant case and all future cases (of whatever origin) because it "is a simple rule to follow." [32] In so doing, it accomplished several things. First, it disregarded one of the few major congressional directives with respect to an appropriate award, *i.e.*, an amount sufficient to "attract

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[29] Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 140 (8th Cir. 1982) (Emphasis added).

[30] *Id.* at 141.

[31] This is not to say that the lower court did not also take the opportunity to mangle its holding. Mr. Winfield became the beneficiary of the *low* Mississippi rate because his services were deemed "particularly . . . necessary," App. A at 20a, a finding, of course, employed by the Seventh and Eighth Circuits for justifying a *higher* hourly rate.

[32] App. A at 18a.

competent counsel . . . while avoiding windfalls to attorneys." [33] Clearly an award geared to the rates of a covered jurisdiction filing under section 5 is sufficient to attract "competent counsel" to represent intervenors. Moreover, in cases arising from the more than 7,000 jurisdictions now covered by section 5 whose economic conditions lag far behind those found in the District of Columbia, the approach taken by the lower court can only result in a "windfall" to attorneys practicing in these areas who successfully represent intervenors. Finally, and most important, the approach taken by the lower court places it in direct conflict with that of the Seventh and Eighth Circuits which only authorize higher rates in exceptional circumstances. As such, the issue warrants a grant of certiorari.

V. THE HOURLY RATE WHICH MAY BE DEMANDED BY COUNSEL FOR PREVAILING PARTIES WHO ARE MEMBERS OF THE PUBLIC INTEREST BAR PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has clearly held that representation by a public interest group is not a "special circumstance" that should result in a denial of fees. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980). The issue which has not been directly addressed, however, is whether the "prevailing rate" which they may demand for their time is to be directly equatable with attorneys in private practice. Although the Circuits are now uniform in their holdings that the answer is "yes," this uniformity has not been achieved without misgivings. Although the following view apparently has been modified,[34] as recently as

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[33] See, e.g., H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 9 (1976).

[34] See Watkins v. Mobile Housing Bd., 632 F.2d 565 (5th Cir. 1980); Davis v. City of Abbeville, 633 F.2d 1161, 1164 (5th Cir. 1981).

1980 the Fifth Circuit approved a lower rate for a law professor, noting:

> [S]ome portion of a fee award may be allocable to reimbursing counsel for overhead expenses . . . Indeed in some instances district judges [may] require that testimony bearing on requests for attorneys fees include information on overhead expenses incurred.[35]

In addition, before reversal by an *en banc* court, one panel of the District of Columbia Circuit took this position:

> The attorney [involved in public interest litigation] should be paid an adequate fee for his work and that is all . . . . Those lawyers who choose the commendable course of serving the public interest rather than building a remunerative commercial practice cannot expect the same financial rewards as such practitioners sometime achieve. The law is not a money-grubbing profession; windfalls should not be given to those who successfully represent persons not properly treated by our Government . . . . It would be a gross mistake to make the highest level of charges in the private sector a measure of compensation to be paid all attorneys who seek to vindicate an identifiable public interest.[36]

If intervenors had been represented only by a member of the private bar, their fee request would have been guided by specific, tightly-drawn evidentiary requirements of the District of Columbia Circuit to justify the rate requested. In particular, an applicant must "submit specific evidence of his or her actual billing practice during the relevant time period" and

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[35] E.E.O.C. v. Strasburger, Price, Kelton, Martin, & Unis, 626 F.2d 1272, 1276 (5th Cir. 1980).

[36] Copeland v. Marshall, 594 F.2d 244, 257 (D.C. Cir. 1978), *as clarified*, 20 FEP Cases 79, *reversed*, 641 F.2d 880 (D.C. Cir. 1980) (en banc).

> [t]his rate is not what he would have liked to receive, or what the client paid in a single fortunate case, but what an average counsel has in fact received. It is obvious that where counsel customarily exercises billing judgment by not billing at the market rate or the full amount of time expended, this fact must be considered in calculating counsel's true billing rate.[37]

In contrast, a request for fees by a member of the public interest bar need only incorporate affidavits that recite "the precise fees that attorneys with similar qualifications have received from fee paying clients in comparable cases . . . ." [38] The result, as in the instant case, is that public interest attorneys merely file affidavits from partners in prestigious firms in the District,[39] which, in turn and by operation of law, transfers the economics of these institutions (including a massive overhead and a commensurate ability to attract clients capable of paying fees from $125 to $150 per hour) to the person or entity now liable under the fee-shifting mechanism.

At this point, petitioners have no interest in exploring the policy reasons behind the current uniformity in circuits which serve to justify such a result. Rather, the important issue is whether the approach taken is one which conforms with a legislative history which *clearly* directs the courts to award fees in such a manner.[40] This is a federal question that demands ultimate resolution by this Court.

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[37] National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1326 (D.C. Cir. 1982).

[38] *Id.* at 1325.

[39] Intervenors filed affidavits from partners in Shea & Gardner; Arent, Fox, Kitner, Plotkin & Kahn; and Williams & Connolly.

[40] *E.g.*, Copeland v. Marshall, 614 F.2d 880, 899 (D.C. Cir. 1980) (en banc) (citing House and Senate reports which, in turn, cite cases in which lower courts applied rates of the private bar to a public interest law firm).

VI. THE ISSUE OF THE EXACT SCOPE OF RESPONSIBILITY OF A DISTRICT COURT JUDGE WHEN A FEE REQUEST IS OPPOSED PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At the time that petitioners requested an evidentiary hearing and filed a motion in support thereof, there was only one district court decision in the circuit on the issue. It held that a "complete and particularized evidentiary foundation, developed, if necessary, at an evidentiary hearing," must support an award of fees.[41] Subsequently, the circuit altered this approach in *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980) (en banc), when it rejected the government's argument that it was error for the trial judge not to hold a hearing on the issue of fees:

> Such a hearing may sometimes be useful. In this case, however, the District Court ruled on the fee question after witnessing the conduct of the entire case, and with the benefit of substantial briefs from both sides. We cannot say that failure to hold a hearing under these circumstances was error. Moreover, the government never took the elementary step of asking the District Court to hold a hearing.

In the instant case, and in sharp contrast with the facts in *Copeland*: (1) a majority of the hours claimed by those requesting fees has been spent performing tasks not subject to the trial judge's professional evaluation, *e.g.*, discovery and preparing briefs for review by this Court; (2) petitioners had requested an evidentiary hearing; and (3) petitioners' memorandum in support thereof not only demonstrated specific factual issues which were hotly disputed but also decried the inadequacies of the filings on their face since they made no attempt to deal with duplication between intervenors' counsel and those representing the Department of Justice. In reversing and

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[41] Bachman v. Pertschuk, 19 EPD ¶ 9044, at 6503 (D.D.C. 1979).

requiring a hearing only as to hours submitted by Mr. Winfield, the lower court held as follows:

> Appellants [petitioners] similarly have failed to specify their challenges to Parker's claimed hours. We emphasize that the party challenging an application for fees should frame its objections with specificity. The district court cannot inquire into the reasonableness of every action taken and every hour spent by counsel, and it will consider objections to filed hours only where it has been presented with a reasonable basis for believing the filing is excessive.

App. A at 15a.

Petitioners' memorandum in support of an evidentiary hearing did, however, clearly contest "with specificity" the number of hours filed.[42] Thus, what has occurred below and what is occurring in district courts throughout the country is that in a proceeding which this Court has now found to be "uniquely separable from the cause of action proved at trial," *White v. New Hampshire*, 102 S. Ct. 1162, 1166 (1982), the lower courts are employing an *ad hoc* approach to procedural responsibilities of the litigants and district courts when fee requests are opposed. Moreover, although this Court has concluded with respect to fee requests under the Clayton Act that "as a general rule" they should only be decided "after hearing evidence," *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970), there are no clear, definitive guidelines as to when hearings should be held,[43] whether discovery is fully

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[42] On the matter of hours, petitioners dispute the totals submitted by Messrs. Parker and Winfield. The number of identical entries (an issue over and above that of duplicative work) calls for an intensive examination by this Court which can only be implemented by requiring "cogent and reliable documentation" . . . .

Id. at 144.

[43] One district court has characterized such proceedings as "an informational aid to the court," rather than "an adversarial

available [44] or, most importantly, what the responsibilities of the trial judge are in granting or denying fees. See *Consolidated Freightways Corp. v. Kassel*, 102 S. Ct. 1496 (1982).

The District of Columbia Circuit recently expressed its concern "that an unnecessary volume of attorney fee disputes are coming before the District Court" and being appealed.[45] Its efforts to establish some definitive guidelines, however, evoked the following response in a concurring opinion:

> Attorneys' fees applications are, of course, closely related to the merits . . . . At the same time, however, they are more akin to completely separate civil suits. It is the mixed nature of such proceedings, I believe, that give rise to much of the procedural floundering . . . .[46]

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process." Farris v. Cox, 508 F. Supp. 222, 227 n.16 (N.D. Cal. 1981). Some courts have held that if affidavits and briefs are complete, no hearing is required. See Manhart v. City of Los Angeles, 652 F.2d 904, 908 (9th Cir. 1981); Lipscomb v. Wise, 643 F.2d 219, 323 (5th Cir. 1981). Still other courts have held, pursuant to *Perkins*, that when a fee request is opposed, a hearing ordinarily will be held. Kargman v. Sullivan, 589 F.2d 63, 67 (1st Cir. 1978); City of Detroit v. Grinnell Corp., 495 F.2d 448, 473-74 (2d Cir. 1974). See also National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982) (hearing when there are "disputed issues of fact").

[44] Recently, the District of Columbia Circuit held:

> Discovery requests should be precisely framed and promptly advanced before final opposition papers are filed . . . [U]nfocused requests to initiate discovery without indicating its nature or extent serve no purpose. . . .

National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982).

The response in a concurring opinion was that the opinion "provided sorely needed guidance to applicants for attorneys' fees, opposing parties, and district judges alike." *Id.* at 1337 (Tamm, J., concurring).

[45] *Id.* at 1330.

[46] *Id.* at 1337 (Tamm, J., concurring).

The time is ripe for this Court to give authoritative guidance to the lower courts on the procedures to be employed when a fee request is contested as well as the responsibilities of district judges in such proceedings. These are important issues of federal law which have not been but should be decided by this Court.

VII. CONCLUSION

One commentator has concluded that the current process for determining an award of fees is comparable to a "court-directed game of roulette" which "has the same attractions for the adventuresome lawyer as those found in other games of chance." [47] The many issues raised in this petition now offer the Court the opportunity to give sorely-needed guidance to the lower courts with respect to their responsibilities when a fee-shifting request is made.

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[47] J. Dawson, *Lawyers & Involuntary Clients in Public Interest Litigation*, 88 HARV.L.REV. 849, 929-30 (1975).